

**ORIGINAL**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20054

FEB 17 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF GENERAL COUNSEL

In re	)	
	)	
Implementation of Section 309(j)	)	MM Docket No. <u>97-234</u>
of the Communications Act --	)	
Competitive Bidding for	)	
Commercial Broadcast and ITFS	)	
Licenses	)	
	)	
Reexamination of the Policy	)	
Statement on Comparative	)	
Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the FCC's	)	
Comparative Hearing Process to	)	
Expedite the Resolution of Cases	)	GEN Docket No. 90-264

To: John Riffer, Esq.  
Office of General Counsel (Room 610)

**REPLY COMMENTS OF R & S Media ET AL**

R & S Media ("R & S"), Apple Maggot Broadcasting Company ("AMBC") et al <sup>1/</sup> respectfully submit these Reply Comments in the above-captioned Notice of Proposed Rulemaking, released Nov. 26, 1997 ("NPRM").

**Summary**

In their January 1998 Comments, R & S et al addressed only the question of the FCC's discretion under the Balanced Budget Act of 1997 ("BBA") to approve "pre-acceptance" mergers or other settlements among broadcast applicants filing at the FCC after July 1, 1997. R & S asserted that the NPRM misconstrues the BBA

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<sup>1/</sup> These Reply Comments also are filed on behalf of other clients of the undersigned counsel who are at this time attempting to negotiate private settlements among "post-July 1, 1997 applicants" for various other new broadcast facilities.

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of 1997 and thus misperceives the FCC's discretion to grant "pre-acceptance" mergers (or other settlements) among "post-July 1st" applicants. These Reply Comments respond to the "Joint Comments" filed by David D. Oxenford, Esq. (of Fisher Wayland Cooper Leader & Zaragoza, LLP) on behalf of six applicants for new broadcast service who filed at the FCC after July 1, 1997 (hereafter the "Joint Applicants"). <sup>2/</sup>

#### Discussion

In their January 1998 Comments, R & S, AMBC et al asserted that the FCC has the discretion under the BBA to approve their settlements and grant both R&S Media's post-July 1st application for a new FM station at Homedale, ID and AMBC's post-July 1st application for a new FM station at Naches, WA <sup>3/</sup> because neither of those two applications has been "accepted for tender" by the FCC, much less "accepted for filing" by the FCC. <sup>4/</sup>

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<sup>2/</sup> Those applicants are Dakota Communications, Livingston County Broadcasters, Inc., Media One Group-Erie, Ltd., Point Broadcasting Co., David & Lynn Magnum, Sun Valley Radio Company, Inc and Western Communications, Inc.

<sup>3/</sup> R & S Media and AMBC each filed Settlement Agreements with the FCC last October, seeking FCC consent to remove the mutual exclusivity in their Homedale, ID and Naches, WA cases by dismissing the applications of their respective sole competitors, "accepting" their respective applications and thereafter granting those applications for new broadcast service at Homedale, ID and Naches, WA.

<sup>4/</sup> They argued that, since the BBA requires the FCC to auction only those post-July 1st mutually exclusive applications that have been "accepted" by the FCC, the FCC should construe the BBA as granting the FCC the discretion to approve mergers or other settlements that remove the mutual exclusivity prior to the time that such applications are "accepted" by the FCC. See Comments at 2; see also BBA at Section 3002(a)(1)(A)(1).

In their Joint Comments, the Joint Applicants did not address the issue raised by R & S et al but, rather, argued that if the FCC conducts auctions of post-July 1st cases it should not reopen the filing windows that have closed. They are correct. First, the FCC should not change the rules and "re-open" filing windows that it previously announced as "closed."

Second, such a capricious change of policy would also serve, as a practical matter, to long delay these proposed new broadcast services. Not only would "re-opening" these closed windows itself insert lengthy delays into the process but such capricious FCC action certainly would be subject to several years of judicial review, likely culminating in reversal. Moreover, in the August 1997 BBA, Congress listed as its highest priority "the development and rapid deployment" of new service to the public "without administrative or judicial delays." See 47 USC 309(j)-(3).

Third, we agree with the Joint Applicants (Joint Comments at 6) that Congress has strongly hinted that the FCC should not capriciously scuttle the reasonable expectations of applicants, such as R & S and AMBC, who diligently filed applications for new broadcast service within announced filing windows. Indeed, as for pre-July 1st applicants, the Congress explicitly forbid the FCC to re-open any closed filing windows. See 47 USC 309(1)(2). It is reasonable to infer that, while Congress may have given the FCC more discretion regarding "post-July 1st" applicants, Con-

gress respected the significant rights of applicants who diligently file within precise windows established by the FCC.

Fourth, the Joint Applicants correctly observe that to "re-open" the closed filing windows and permit additional applicants for new broadcast service would undermine the integrity of the FCC's processes. The public has come to expect that it can rely on the FCC to abide by established filing and processing rules. Our clients, R & S Media and AMBC, both relied on the integrity of the FCC's announced filing windows, expended thousands of dollars in reliance thereon and timely filed applications for new service by the closing date of announced filing windows. It would gravely undermine the integrity of the FCC's administrative process for the FCC to conclude, for any reason, <sup>5/</sup> that it should "re-open" those closed filing windows.

Finally, the persuasive argument against reopening "closed" filing windows, advanced by the Joint Applicants, strongly supports the FCC's grant of our clients' pending settlement agreements. In both of those two settlements, one applicant has agreed to dismiss its application in order that the only other might have its application "accepted" and subsequently granted by the FCC. Even if the FCC were to deny the settlements and require these two cases to proceed to a "closed" auction, in each case the parties are bound by a contract that requires only one

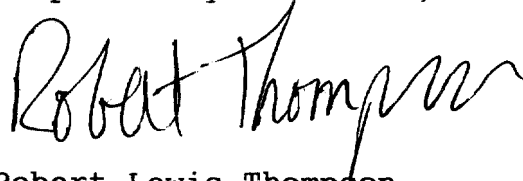
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<sup>5/</sup> The Joint Applicants correctly note that Congress has directed the FCC NOT to base its implementation of the BBA "on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection." See 47 USC 309(j)-(7)(A). Joint Comments at 5 and note 9.

party to prevail. Thus, in any such auction, R & S would bid \$1 for the Homedale permit and AMBC would bid \$1 for the Naches permit and their respective competing applicants would be bound by contract not to bid. The loser in such circumstances would be the public, for whom the "first local service" at Homedale, ID, and the "first competing FM service" at Naches, WA would be greatly delayed by whatever new auction process is ultimately adopted by the FCC and approved by the Court. <sup>6/</sup>

WHEREFORE, R & S Media and AMBC respectfully submit that the "Joint Comments" support their own January 26, 1998 Comments in this proceeding and the FCC should exercise its discretion in favor of approving their respective pending settlements.

Respectfully submitted,



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February 17, 1998

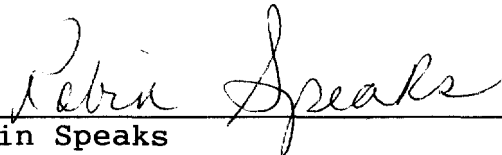
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<sup>6/</sup> Whatever auction rules are adopted later this year by the FCC certainly will be appealed by one or more frustrated parties to the court of appeals, whose decision even if expedited would not be forthcoming until the year 2000 at the earliest.

**CERTIFICATE OF SERVICE**

I, Robin Speaks, do certify that on February 17, 1998, I served copies of the foregoing "Reply Comments" on the following counsel by first class mail:

David D. Oxenford, Esq.  
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Robin Speaks